SPECIAL BENCH.

Before D. N. Mitter, Patterson, Ameer Ali, M. C. Ghose and Nasim Ali JJ.

BURHAN MIRDHA

v.

KHODEJA BIBI.*

1936

Nov. 25; *Dec.* 22.

Mahomedan Law—Marriage—Suit for dissolution—Kâzi—*Jurisdiction of civil Courts—Code of Civil Procedure (Act V of 1908).*

The proper forum for litigation for dissolution of a Mahomedan marriage is the Court of the lowest grade having jurisdiction to try civil suits, the civil Courts having taken the place of *kâzis* under the Mahomedan law.

Mafizuddin Mondal v. *Rahima Bibi* (1); *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood* (2); *Mahomedally Adamji Peerbhoy* v. *Akberally Abdulhussein Adamji Peerbhoy* (3); *Jahora Khatun* v. *Mirza Rahmatulla* (4); *Zafar Husain* v. *Ummat-ur-Rahman* (5); *Rahima Bibi* v. *Fazil* (6); *Khatijabi* v. *Usmansaheb Ansersaheb* (7) and *Ahmed Suleman* v. *Bai Fatma* (8) referred to.

The cases of *wâkf* stand on a different footing as the Mahomedan jurists themselves restrict the jurisdiction in regard to *wâkfs* and charities to the Chief *Kâzi* (*Kâzi-ul-kuzzat*). The functions of the *kâzi* with regard to *wâkf* cases are really the functions of the Chief *Kâzi* who would correspond to the principal civil Court of original jurisdiction.

Shama Churn Roy v. *Abdul Kabeer* (9) and *Nimai Chand Addya* v. *Golam Hossein* (10) distinguished.

The question of the proper forum for litigation being one of procedure and not of substantive law, the matter is governed by the Code of Civil Procedure.

Per M. C. Ghose J. In *Shama Churn Roy* v. *Abdul Kabeer* (9); *Fakrunnessa Begum* v. *District Judge of 24-Parganâs* (11); *Hardut Roy Chameria* v. *Ujir Shaik* (12) and *Atimannessa* v. *Abdul Sobhan* (13) where it was held that the jurisdiction to deal with questions of transfers of *wâkf* properties lay with the District Judge it was in analogy with s. 92 of the Code of Civil Procedure.

*Civil Revision, No. 495 of 1936, against the order of M. H. B. Lethbridge, District Judge of Burdwan, dated Mar. 14, 1936.

(1) (1933) 37 C. W. N. 1043.
(2) (1916) I. L. R. 43 Cal. 1085; L. R. 43 I. A. 127.
(3) (1933) 38 C. W. N. 452.
(4) (1935) S. A. 438 of 1933, decided by M. C. Ghose J. on 7th June.
(5) (1919) I. L. R. 41 All. 278.
(6) (1926) I. L. R. 48 All. 834.
(7) (1927) I. L. R. 52 Bom. 295.
(8) 1930) I. L. R. 55 Bom. 160.
(9) (1898) 3 C. W. N. 158.
(10) (1909) I. L. R. 37 Cal. 179.
(11) (1920) I. L. R. 47 Cal. 592.
(12) (1928) 48 C. L. J. 364.
(13) (1915) I. L. R. 43 Cal. 467.

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CIVIL RULE obtained by the defendant.

The facts of the case and the arguments in the Rule are sufficiently stated in the judgment.

A. S. M. Akram for the petitioner.

Farhat Ali for the opposite party.

Cur. adv. vult.

D. N. MITTER, J. The question of law which falls for determination in this Rule is one of considerable importance and relates to the jurisdiction of civil Courts in suits relating to the dissolution of Mahomedan marriages.

It appears that a suit was instituted by Mussammat Khodeja Bibi against Burhan Mirdha, the petitioner in the Rule, for a declaration that her marriage with the petitioner was dissolved by divorce given by the petitioner or in the alternative for a dissolution of the marriage on the grounds of desertion, cruelty, *etc.*, and for an injunction. The suit was filed in the Court of the District Judge of Burdwan. By his written defence the husband, amongst other defences, raised the contention that the suit should have been instituted in the Court of the lowest grade, *viz.*, the Court of the Munsif and not the Court of the District Judge, the suit being valued at Rs. 10 for the declaration and dissolution and Rs. 5 for the injunction. The learned District Judge framed an issue on the question of jurisdiction and held, negativing the defence of the petitioner, that he has jurisdiction to try the suit, by his order dated March 14, 1936. The petitioner being aggrieved by this order moved this Court and obtained the Rule on the opposite party to show cause as to why the order of the learned District Judge should not be set aside. The learned District Judge rested his conclusion on the ground that the District Judge is the *kâzi* for Mahomedan marriages and that in practice the District Judge has tried such cases, and

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relied on a decision of this Court in *Mafizuddin Mondal* v. *Rahima Bibi* (1).

As the question is one of some importance as it involves the question of proper forum of Courts for dissolution of Mahomedan marriages the matter has been referred to a Special Bench.

The learned District Judge's decision has been attacked on several grounds: (i) There is a Special enactment abolishing *kâzis* (Act XI of 1864) and as the question of the proper forum for litigation is one of procedure and not of substantive law, the matter must be governed by the Civil Procedure Code. (ii) There is no text of Mahomedan law which countenances the proposition that all matrimonial matters must be determined by the Chief *Kâzi*. (iii) The cases which lay down that the District Judge in British administration corresponds to the *kâzi* of Mahomedan times are all cases of *wâkf* and should not be any guide with regard to matrimonial matters. These contentions seem to us to be well founded and must prevail.

It appears to us that the idea or notion that the principal Court of original jurisdiction under the British Government in India is vested generally speaking with the powers exercised by the *kâzi* has been derived from cases relating to *wâkf* under s. 92 of the Code of Civil Procedure or to cases of granting of leases of *wâkf* property: see *Shama Churn Roy* v. *Abdul Kabeer* (2) and *Nimai Chand Addya* v. *Golam Hossein* (3). Indeed the Mahomedan jurists themselves restrict the jurisdiction in regard to *wâkfs* and charities to the Chief *Kâzi* (*the Kâzi-ul-kuzzât*). For example it is stated that the power of sanctioning alteration of investments or change of *wâkf* property, granting longer leases than are ordinarily allowed by law or provided for by the *wâkfnâmâ*, and similar acts, is vested only in the

(1) (1933) 37 C. W. N. 1043. (2) (1898) 3 C. W. N. 158.
(3) (1909) I. L. R. 37 Cal. 179.

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Chief *Kâzi* [see Rt. Hon'ble Syed Ameer Ali's Mahomedan Law, p. 480, note (2), 4th Ed.]. The functions of the *kâzi* with regard to *wâkf* cases are really the functions of the Chief *Kâzi* who would correspond to the Principal Civil Court of original jurisdiction. The *wâkf* cases must, therefore, be kept apart when we are considering the question of the *forum* regarding matrimonial matters where the parties are Mahomedans. It may be pointed out even in a recent *wâkf* case from Lower Burma the Judicial Committee used language which goes to show that the place of *kâzi* in the British Indian system is taken by the civil Courts. See *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood* (1) and *Mahomedally Adamji Peerbhoy* v. *Akberally Abdulhussein Adamji Peerbhoy* (2). But as these two cases were under s. 92 of the Code, the civil Court was the District Judge.

With regard to matrimonial disputes amongst the Mahomedans, however, the civil Courts have taken the place of *kâzis*. In the 5th edition of Rt. Hon'ble Syed Ameer Ali's Mahomedan Law this position has been made clear as the following extract from the said book Vol. II at p. 525 will show :—

> The question naturally arises how should the parties act in British India or even in Moslem feudatory States where no *kazis* have been left to deal with matrimonial difficulties of this character. *The civil Courts have taken the place of* kâzis.

For the opposite party it has been argued that there is a paucity of cases of matrimonial dispute, for women were very reluctant to bring divorce suits, and in ancient times if a wife was dissatisfied with marriage she could apply to the Prophet herself (See Mahomed Ali's Holy Koran—2nd Edn., page 106, footnote 301). It is pointed out that with regard to the power of giving minor girls in marriage and the power of effecting *istibdal* a distinction is drawn between the functions of the *kâzi* and the Chief

(1) (1916) I. L. R. 43 Cal. 1085 (1100); L. R. 43 I. A. 127 (134). (2) (1933) 38 C. W. N. 452.

Kâzi: see *Atimannessa* v. *Abdul Sobhan* (1). It is said that in a matter so serious as dissolution of marriage the District Judge is the better Judge as he alone can dissolve a Christian marriage. It is further argued that there is a uniform practice in Bengal for such suits being tried by District Judges. With regard to this last argument it can be said at once that the practice is not at all uniform. On the other hand it is the experience of some of the members of the Bench that these suits are brought before the Munsif or Subordinate Judge in some cases.

The suit being valued at less than Rs. 1,000 it is the Munsif's Court which is the Court of the lowest grade and under s. 16 of the Civil Procedure Code the suit should have been filed before the Munsif. Section 4 of the Civil Procedure Code does not help the opposite party for there is no special form of procedure prescribed by any other law in force.

We are not impressed by the argument on behalf of the opposite party that as Christian marriages are annulled by the District Judge we should hold that Mahomedan marriages should be dissolved by him and not by Courts of lower grade. The Courts of the lower grade do try cases of restitution of conjugal rights where the parties are Hindus or Mahomedans and we see no reason why they will be incompetent to deal with questions of dissolution of Mahomedan marriages. For the aforesaid grounds we are of opinion that the suit should have been filed before the Munsif who is the Court of the lowest grade having jurisdiction to try such suit.

It is argued, we should not interfere in revision as the District Judge has also jurisdiction to deal with the matter. That is so, but we think in the present case the proper procedure should be followed

(1) (1915) I. L. R. 43 Cal. 467, 481.

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in the first instance and we direct the learned District Judge to return the plaint to the plaintiff for presentation of the same to the Munsif. The rule is made absolute.

There will be no order as to costs in the circumstances of the present case.

PATTERSON J. I agree.

AMEER ALI J. I agree.

M. C. GHOSE J. I agree with my learned brother Mitter J. The word *kâzi* in Arabic means a Judge. It would therefore apply to all Judges of our Courts. In the cases of *Shama Churn Roy* v. *Abdul Kabeer* (1); *Fakrunnessa Begum* v. *District Judge of 24-Parganâs* (2); *Hardut Roy Chameria* v. *Ujir Shaik* (3) and *Atimannessa* v. *Abdul Sobhan* (4), the question was who was the Judge who could deal with questions of transfers of *wâkf* properties. It was held that the jurisdiction lay with the District Judge. This is in analogy with s. 92 of the Code of Civil Procedure. In matrimonial matters there is no reason why cases should not be tried by the Court of the lowest jurisdiction. The question of jurisdiction is a question of procedure, and not of substantive law. The substantive law has been saved to Moslems, but the procedure is to be of our British Indian Courts. As far as I recollect, in Barisal and Jessore, as District Judge, I heard appeals in suits tried by Munsifs on matrimonial disputes of Moslems. In the High Court I heard a Second Appeal on June 7, 1935, *Jahora Khatun* v. *Mirza Rahmatulla* (5); the suit was by a Moslem lady for dissolution of her marriage with the defendant. The suit was valued at Rs. 45; it was heard by a Munsif and the appeal was heard by the appellate Court of

(1) (1898) 3 C. W. N. 158.
(2) (1920) I. L. R. 47 Cal. 592.
(3) (1928) 48 C. L. J. 364.
(4) (1915) I. L. R. 43 Cal. 467.
(5) (1935) S. A. 438 of 1933.

Midnapore. There are reported cases: *Zafar Husain* v. *Ummat-ur-Rahman* (1); *Rahima Bibi* v. *Fazil* (2); *Khatijabi* v. *Umarsaheb Ansersaheb* (3) and *Ahmed Suleman* v. *Bai Fatma* (4), showing that in United Provinces and Oudh and in Bombay such suits are heard by the Courts of the lowest jurisdiction. In my opinion the present suit, which is valued at Rs. 15, should be tried by a Munsif.

NASIM ALI J. I agree.

Rule absolute.

A. A.

(1) (1919) I. L. R. 41 All. 278.
(2) (1926) I. L. R. 48 All. 834.
(3) (1927) I. L. R. 52 Bom. 295.
(4) (1930) I. L. R. 55 Bom. 160.